68

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SUPREME COURT, U.S.

No. 06-1720

IN THE SUPREME COURT OF THE UNITED STATES

LOUISE ELIZABETH HURST,
Petitioner

v.

TEXAS DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES, *ET AL.*,
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case involves the appeal of an individual under the federal Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, of the denial of services she requested from the Department of Assistive and Rehabilitative Services, the state agency delegated the authority to administer this federal program for the State of Texas. The federal district court held that the State of Texas had not waived its immunity under the Eleventh Amendment of the United States Constitution with respect to Title I of the Rehabilitation Act. *Hurst v. Texas Dep't of Assistive & Rehab. Serv.*, 392 F.Supp.2d 794 (W.D. Tex. 2005). This decision was affirmed by the U.S. Court of Appeals for the Fifth Circuit. *Hurst v. Texas Dep't of Assistive & Rehab. Serv.*, 482 F.3d 809 (5th Cir. 2007).

This case presents the following question:

Does Title I of the Rehabilitation Act contain a clear statement of the intent of Congress to require a state to waive its immunity under the Eleventh Amendment to the United States Constitution in order to receive federal funding for programs authorized by the Act?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Brief in Opposition 1

Statement of the Case 2

Reasons for Denying the Petition 4

I. THERE IS NO DIRECT CONFLICT AMONG THE CIRCUITS ON THE ISSUE IN THIS CASE. 4

II. THE STANDARD FOR WAIVER OF ELEVENTH AMENDMENT IMMUNITY. 6

III. SECTION 102 OF THE REHABILITATION ACT DOES NOT PROVIDE A CLEAR STATEMENT OF INTENT TO REQUIRE A WAIVER OF ELEVENTH AMENDMENT IMMUNITY IN ORDER TO RECEIVE FEDERAL FUNDS. 7

IV. THE "STRUCTURE" OF THE REHABILITATION ACT DOES NOT PROVIDE A CLEAR STATEMENT OF INTENT TO WAIVE ELEVENTH AMENDMENT IMMUNITY. 12

A. The Fact That the State Is the Only Possible Defendant Does Not Make This a Clear Statement of Congressional Intent. 13

B. This Court Has Not Adopted the Notion of a "Non-verbal Voluntary Waiver" of Eleventh Amendment Immunity, Nor Should It. 15

C. Ms. Hurst's Position Would Reintroduce A Subjective Standard for Interpretation of Eleventh Amendment Immunity. 16

V. CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Arlington Cent. School Dist. Bd. of Ed. v. Murphy,
548 U.S. __, 126 S.Ct. 2455 (2006) 9, 10, 15

AT&T Comm. v. Bellsouth Telecom.,
238 F.3d 636 (5th Cir. 2001) 1, 12, 15

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985). 1, 4, 6, 10,11

Boag v. MacDougall, 454 U.S. 364 (1982) 5

Bunting v. Mellen, 541 U.S. 1019 (2004) 5

College Savings Bank v. Florida Prepaid Post Secondary Ed. Ex. Bd., 577 U.S. 680 (1999) 16

Dellmuth v. Muth,
491 U.S. 223 (1989) 1, 10-12, 14

Diamond v. Michigan,
431 F.3d 262 (6th Cir. 2005) 4

Ex parte Young, 209 U.S. 123 (1908) 15

Hurst v. Texas Dep't of Assistive & Rehab. Serv.,
392 F.Supp.2d 794 (W.D. Tex. 2005). ..... i, 3

Hurst v. Texas Dep't of Assistive & Rehab. Serv.,
482 F.3d 809 (5th Cir. 2007) ..... i, 3

Johnson-Lloyd v. Vocational Rehabilitation Office,
813 F.Supp. 1120 (E.D.Pa. 1993) 8

Jones v. Illinois Dep't of Rehabilitation Servs.,
504 F.Supp. 1244 (N.D.Ill. 1981), aff'd, 689 F.2d 724
(7th Cir. 1982) 8

Kimel v. Florida Bd. of Regents,
528 U.S. 62 (2000) 6, 12

Lapides v. Board of Regents of University System of Georgia,
535 U.S. 613 (2002) 5

McGuire v. Switzer,
734 F.Supp. 99 (S.D.N.Y. 1990) 8

MCI Telecom. Corp. v. Illinois Bell Tel. Co.,
222 F.3d 323 (7th Cir. 2000) 12, 15

Pace v. Bogalusa City School Bd.,
403 F.3d 272 (5th Cir. 2005) 2

Pennhurst State School and Hosp. v. Halderman,
451 U.S. 1 (1981) 4, 9

Reaves v. Missouri Dept. Of Elem and Second. Educ.,
422 F.3d 675 (8th Cir. 2005) 4

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 4

Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp.,
350 U.S. 124 (1956). 5

Ryans v. New Jersey Comm'n for the Blind and Visually Impaired,
542 F.Supp. 841 (D.N.J. 1982) 8

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996). 13, 15

South Dakota v. Dole,
483 U.S. 203 (1987). 7

United States v. Bass,
404 U.S. 336 (1971) 4

Verizon Maryland, Inc. v. Public Service Com'n of Maryland,
535 U.S. 635 (2002). 15

CONSTITUTIONAL PROVISIONS

Spending Clause,
U.S. Const. Art. I, §8, ch.1 ..... passim

Eleventh Amendment,
U. S. Const. Amend. XI ..... passim

STATUTES

20 U.S.C. § 1415(e)(2) 11

20 U.S.C. § 1415(i)(3)(B) 10

25 U.S.C. § 2701 13

25 U.S.C. § 2710(d)(7)(A)(i) 13, 14

25 U.S.C. § 2710(d)(7)(B) 14

25 U.S.C. § 2710(d)(7)(B)(ii)(II) 14

25 U.S.C. § 2710(d)(7)(B)(iii) 14

25 U.S.C. § 2710(d)(7)(B)(iv) 14

25 U.S.C. § 2710(d)(7)(B)(v) 14

25 U.S.C. § 2710(d)(7)(B)(vi) 14

25 U.S.C. § 2710(d)(7)(B)(vii) 14

29 U.S.C. § 722 ..... 8, 9

29 U.S.C. § 722(c)(5)(J)(i) 1, 8, 9, 12, 14

29 U.S.C. § 701 i

47 U.S.C. § 151 12

Act of Sept. 26, 1973, Pub.L. 93-112, Title I, § 102, 87 Stat. 368 8

Act of Nov. 29, 1975, Pub. L. 94-142, § 1, 89 Stat. 773. 11

Act of Oct. 21, 1986, Pub. L. 99-506, Title II, § 203, 100 Stat. 1815. 8

TEX. GOV'T CODE § 311.034 2

Title I, § 102, Rehabilitation Act of 1973 ..... i, 1, 7, 8

BRIEF IN OPPOSITION

The District Court dismissed this case because it found that the State of Texas had not waived its immunity under the Eleventh Amendment to the U.S. Constitution. The Eleventh Amendment prohibits suits by a citizen of a state or another state or foreign country against a state in federal court. There are exceptions to this limitation, but in order for Congress to create an exception, it must provide a "clear statement" of its intent to create an exception. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Congress has the power to directly abrogate this immunity under the Fourteenth Amendment, but for a program under the Spending Clause of Article I of the U.S. Constitution, a state must agree voluntarily to waive its immunity from suit. A part of that voluntary waiver is the requirement of a clear statement of intent to waive immunity in the law.

This lawsuit is brought under Title I, § 102 of the Rehabilitation Act of 1973, as amended. 29 U.S.C. § 722(c)(5)(J)(i). This provision does not provide the clear statement required to have an effective waiver of Eleventh Amendment immunity. In fact, contrary to Petitioner's assertion, this Court considered language that is nearly identical to this provision and determined that it did not meet this requirement. *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989).

Ms. Hurst substantially relies on the decision of the Court of Appeals for the Fifth Circuit in *AT&T Communications v. BellSouth Telecommunications, Inc.*, 238 F.3d 636 (5th Cir. 2001), but that case is distinguishable from the current one. The federal Telecommunications Act preempted state regulation of telecommunications, allowing only a limited role for states as arbiters of disputes in a free

market industry. The Telecommunications Act prohibits appeals to state courts, leaving the federal courts as the only avenue of appeal. The Texas Department of Assistance and Rehabilitative Services (DARS), on the other hand, is the state agency that fully administers this rehabilitation program and is responsible for all services to be delivered to consumers such as Ms. Hurst. The appropriate precedent in the Fifth Circuit is *Pace v. Bogalusa City School Bd.*, 403 F.3d 272 (5th Cir. 2005), and that case supports the decision in this case.

The Court of Appeals also found that the State of Texas has not waived its Eleventh Amendment immunity through the adoption of administrative rules or state statutes. DARS does not have the authority to waive this immunity, because the Texas Legislature has specifically reserved this power to itself. TEX. GOV'T CODE § 311.034. Further, no act of the Texas Legislature provides the unequivocal statement necessary to waive Eleventh Amendment immunity.

STATEMENT OF THE CASE

Ms. Hurst became a client of the Texas Rehabilitation Commission, the predecessor agency to Respondent DARS, in the spring of 2002. She sought medical assistance for an anomaly in her cervical spine. Ms. Hurst was examined by two neurosurgeons and her final diagnosis called for what the agency considered exploratory surgery. The agency determined that this treatment was outside the scope of services authorized in this program. Ms. Hurst requested an administrative hearing to review this decision. A hearing was held in September 2003 and the hearing officer upheld the decision of the staff that the requested services could not be

provided under the policy of the agency. That decision became final on October 24, 2003.

Following the adverse decision in the administrative hearing at the agency, Ms. Hurst brought this suit in the U.S. District Court. DARS filed a Motion to Dismiss based on Eleventh Amendment immunity that was granted by the District Court. *Hurst v. Texas Dep't of Assistive & Rehab. Serv.*, 392 F.Supp.2d 794 (W.D. Tex. 2005). The Court of Appeals affirmed the decision, holding as follows:

> Section 102 of the Rehabilitation Act does not contain the necessary "clear-statement" requiring a waiver of Eleventh Amendment immunity if the State of Texas accepts federal funds for this program. Neither has Texas voluntarily waived its Eleventh Amendment immunity for this program. We, therefore, affirm the judgment of the district court dismissing this suit.

Hurst v. Texas Dep't of Assistive & Rehab. Serv., 482 F.3d 809, 814 (5th Cir. 2007).

REASONS FOR DENYING THE PETITION

Ms. Hurst's petition attempts to take the settled law of this Court and turn it on its head. The "clear statement" test has been consistently applied in Eleventh Amendment cases, whether based on the Fourteenth Amendment or the Spending Clause, for at least twenty years, since *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). The test has been applied in other cases involving the balance of powers between the states and the federal government for many years before that. *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1 (1981); *United States v. Bass*, 404 U.S. 336 (1971); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Contrary to the Petition of Ms. Hurst, the decision of the Court of Appeals is consistent with the decisions of this Court on the Eleventh Amendment. It is the reversal of the decision of the Court below that would introduce uncertainty into this area of jurisprudence.

I. THERE IS NO DIRECT CONFLICT AMONG THE CIRCUITS ON THE ISSUE IN THIS CASE.

Ms. Hurst has alleged that the petition should be granted because "differing approaches among the lower courts could create inconsistency among the circuits." Petition at 6. DARS wants to clarify that whatever potential there may be for conflict, there are no current conflicts existing among the Circuits that would justify granting the petition.

Ms. Hurst cites *Diamond v. Michigan*, 431 F.3d 262 (6th Cir. 2005) and *Reaves v. Missouri Dept. Of Elem and Second. Educ.*, 422 F.3d 675 (8th Cir. 2005) in support of this proposition. A review of these decisions shows that neither

Court of Appeals addressed the issue of Eleventh Amendment immunity, nor did the district courts prior to those appeals. It is difficult to find a conflict between these decisions and the lower Court here when the issue was not addressed at all. If the states of Michigan and Missouri did not raise the issue of Eleventh Amendment immunity, it was waived. "[A] State's voluntary appearance in federal court amounts to a waiver of its Eleventh Amendment immunity, [citations omitted]." *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002).

Where there is a conflict in decisions among the Circuits, it is appropriate for this Court to grant certiorari. *Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp.*, 350 U.S. 124 (1956). There are few published decisions that address the opposite situation, where the Court determined affirmatively that there was not a conflict and denied the grant of certiorari. One such case was *Bunting v. Mellen*, 541 U.S. 1019 (2004). In that case, the majority examined three Court of Appeals decisions on sponsorship of nondenominational prayer at state colleges and rejected grant of the writ due to "the absence of a direct conflict among the Circuits." *Id.* at 1021.

There is no conflict among the Circuits and therefore no basis for the Court to consider granting certiorari. The possibility of a future conflict is not a basis for certiorari. As former Chief Justice Rehnquist stated, "[W]e must never forget that this Court is not a forum for the correction of errors." *Boag v. MacDougall*, 454 U.S. 364, 367-368 (1982) (dissenting opinion).

II. THE STANDARD FOR WAIVER OF ELEVENTH AMENDMENT IMMUNITY.

The Eleventh Amendment to the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. AMEND. XI. Generally, the Eleventh Amendment prevents individual citizens from suing a non-consenting state in federal court. Congress has limited power to abrogate the Eleventh Amendment immunity, and the Court must answer two questions to determine whether a particular law allows such a suit. First, Congress must unequivocally express its intent to abrogate that immunity; and second, if it did, Congress must act pursuant to a valid grant of constitutional authority. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. at 242. Congress does not have the power to abrogate the Eleventh Amendment under Article I of the U.S. Constitution, but does have that power under § 5 of the 14th Amendment. *Id.*

In order to waive immunity under the Spending Clause, U.S. Const. Art. I, § 8, cl. 1, a state must voluntarily waive this immunity. Under this theory, a State must have a real choice and voluntarily agree to federally imposed conditions in order

to receive federal funds, including waiver of Eleventh Amendment immunity. Not all such conditioned waivers are valid, however, and this Court has established a test for these waivers:

> (1) Federal expenditures must benefit the general welfare;
> (2) The conditions imposed on the recipients must be unambiguous;
> (3) The conditions must be reasonably related to the purpose of the expenditure;
> (4) No condition may violate any independent constitutional prohibition; and
> (5) The condition may not be coercive.

South Dakota v. Dole, 483 U.S. 203, 207-211 (1987).

DARS does not dispute that all but the second requirement of the *Dole* test are satisfied. DARS is in agreement with the lower courts that the statute here lacks a clear statement of intent to condition funding on a voluntary waiver of Eleventh Amendment immunity.

III. SECTION 102 OF THE REHABILITATION ACT DOES NOT PROVIDE A CLEAR STATEMENT OF INTENT TO REQUIRE A WAIVER OF ELEVENTH AMENDMENT IMMUNITY IN ORDER TO RECEIVE FEDERAL FUNDS.

Ms. Hurst complains of the Court of Appeals' decision that Section 102 of the Rehabilitation Act does not provide a basis for jurisdiction in federal court. This case turns largely

on the question of whether 29 U.S.C. § 722(c)(5)(J)(i) provides a clear statement of intent to waive the Eleventh Amendment immunity of the states. The statute provides as follows:

> § 722. Eligibility and individualized plan for employment. ***
>
> (c) Procedures ***
>
> (5) Hearings. ***
>
> (J) Civil action.
>
> (i) In general. Any party aggrieved by a final decision described in subparagraph (I), may bring a civil action for review of such decision. The action may be brought in any State court of competent jurisdiction or in a district court of the United States of competent jurisdiction without regard to the amount in controversy.

Section 722 was originally adopted as § 102 of the Rehabilitation Act of 1973. Act of Sept. 26, 1973, Pub.L. 93-112, Title I, § 102, 87 Stat. 368. Following the 1986 amendments to the Act (Act of Oct. 21, 1986, Pub.L. 99-506, Title II, § 203, 100 Stat. 1815.), several courts found that there was no private right of action to appeal the administrative determination of the benefits due under the Act. *See Johnson-Lloyd v. Vocational Rehabilitation Office*, 813 F.Supp. 1120, 1123-24 (E.D. Pa. 1993); *McGuire v. Switzer*, 734 F.Supp. 99, 111 & n. 11 (S.D.N.Y. 1990); *Ryans v. New Jersey Comm'n for the Blind and Visually Impaired*, 542 F.Supp. 841, 845-46 (D.N.J. 1982); *Jones v. Illinois Dep't of Rehabilitation Servs.*, 504 F.Supp. 1244, 1249-51 (N.D. Ill. 1981), aff'd, 689 F.2d 724 (7th Cir. 1982).

In 1998, Congress again amended the Act and provided

for a private right of action in either state or federal court. This amendment included the language at issue here, 29 U.S.C. § 722 (c)(5)(J)(i).

The title of 29 U.S.C. § 722 is "Eligibility and individualized plan for employment." This section of the Act is a part of a program to provide benefits to individuals with disabilities through federal grants to enable the individuals to become gainfully employed. It is a welfare program, authorized by the Spending Clause, U.S. CONST. Art. I, § 8, cl. 1:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties; Imposts and Excises shall be uniform throughout the United States.

As noted above, § 722 was amended in 1998 in reaction to holdings of courts that there was no private right of action to appeal an administrative determination on eligibility for services. There is no evidence of intent to link acceptance of federal funds with a waiver of Eleventh Amendment immunity under this provision, and, accordingly, there has been no waiver of Eleventh Amendment immunity for 29 U.S.C. § 722 by acceptance of federal funds. There is no mention of Eleventh Amendment immunity in this provision.

As this Court points out, "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain'." *Arlington Cent. School Dist. Bd. of Ed. v. Murphy*, 548 U.S. __, 126 S.Ct. 2455, 2459 (2006), citing *Pennhurst*, 451 U.S. at 17. In *Murphy*, the Court held that a provision that a court may "award reasonable attorneys'

fees as part of the costs" to a prevailing parent in an Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(3)(B) case was not clear enough to allow the court to also award cost of expert witness fees. *Id.* Waivers of immunity must be stated, not implied.

While cases dealing with abrogation of Eleventh Amendment Immunity under the Fourteenth Amendment are usually distinct from Spending Clause cases, this Court has recognized that the "clear statement" test applied to Congressional enactments is the same for both purposes. *Atascadero*, 483 U.S. at 247. The following case involves abrogation under the Fourteenth Amendment, but the clear statement test is identical for waiver under the Spending Clause.

In *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), this Court reviewed the following language to determine if it provided a clear statement of Congress' intent to waive Eleventh Amendment immunity:

> (2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and **any party aggrieved** by the findings and decision under subsection (c), shall have the right **to bring a civil action** with respect to the complaint presented pursuant to this section, which action **may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.** In any action brought under this paragraph the court shall receive the records of the administrative

> proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. [Emphasis supplied.]

Act of Nov. 29, 1975, Pub. L. 94-142, § 1, 89 Stat. 773 [42 U.S.C. § 1415 (d)(2), repealed].

The *Dellmuth* Court held that the above language was insufficient to waive Eleventh Amendment immunity. After first rejecting the lower court's holding that intent to waive Eleventh Amendment immunity could be found in the legislative history of an act of Congress, the Court stated:

> Finally, 20 U.S.C. § 1415(e)(2), the centerpiece of the Court of Appeals' textual analysis, provides judicial review for aggrieved parties, but in no way intimates that the States' sovereign immunity is abrogated. As we made plain in *Atascadero*: "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."

Dellmuth, 491 U.S. at 231.

This language, the highlighted portions of which are word-for-word identical to the language at issue in this case, was specifically rejected by this Court on the grounds that it is not the clear statement necessary to waive a state's Eleventh Amendment immunity. Section 102 of the Rehabilitation Act is precisely the kind of "general authorization for suit in federal court" that this Court rejected as being insufficient to

waive Eleventh Amendment immunity. *Id.* There is no indication that this Court has changed its opinion on this point, since *Dellmuth* is still cited by the Court as one of the principle sources of the clear statement test. *Kimel*, 528 U.S. at 73. This law does not provide a clear statement of intent to waive Eleventh Amendment immunity, and the District Court properly dismissed this suit.

IV. THE "STRUCTURE" OF THE REHABILITATION ACT DOES NOT PROVIDE A CLEAR STATEMENT OF INTENT TO WAIVE ELEVENTH AMENDMENT IMMUNITY.

Ms. Hurst attempts to find a clear statement of the intent of Congress to require the States to waive Eleventh Amendment immunity in the overall "structure" of the Rehabilitation Act. This approach is belied by the way in which the appeals provision was added to the Act in the first place. Prior to the 1998 amendment of the Act, there was no appeal provision at all, and, as noted above, several courts had so held. When the provision granting appeal was added, it took the form of a single subsection allowing "a civil action for review of such decision * * * in any State court of competent jurisdiction or in a district court of the United States." 29 U.S.C. § 722(c)(5)(J)(i).

This section of the Rehabilitation Act clearly does not constitute a comprehensive structure for handling appeals such as that contained in the Telecommunications Act of 1996, 47 U.S.C. § 151, *et seq.* The cases she cites, *AT&T Comm. v. Bellsouth Telecom.*, 238 F.3d 636 (5th Cir. 2001) and *MCI Telecom. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir.

2000), dealt with the Telecommunications Act of 1996 and a waiver of Eleventh Amendment immunity under the Commerce Clause rather than the Spending Clause. Both are found in Article I of the U.S. Constitution, and the requirements for waiver of immunity by the States are similar. There must be a clear statement of intent by the Congress of intent to waive the immunity of the States and there must be a voluntary waiver by the State. Thus, the analysis is similar.

A. The Fact That the State Is the Only Possible Defendant Does Not Make This a Clear Statement of Congressional Intent.

Ms. Hurst asserts that the fact that the State of Texas is the only possible defendant in suits under the Rehabilitation Act creates "unambiguous intent to waive state's immunity from suit. Petition at 9. Yet the Petitioner ignores the only case in this Court that addresses a similar statute, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). In that case, this Court considered whether the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*, contained "an unmistakably clear statement of its intent to abrogate." *Id.* at 56. That Act provides authority for States to negotiate agreements with Indian tribes for the conduct of gambling operations on Indian lands. The only parties to the agreements are the States and the tribes. The only defendants for the tribes to sue are the States. The decision described the detailed statutory scheme that provided for appeal to the federal courts:

> Section 2710(d)(7)(A)(i) vests jurisdiction in "[t]he United States district courts ... over any cause of action ... arising from the failure of a State to enter into negotiations ... or to conduct such negotiations in good faith." Any

> conceivable doubt as to the identity of the defendant in an action under § 2710(d)(7)(A)(i) is dispelled when one looks to the various provisions of § 2710(d)(7)(B), which describe the remedial scheme available to a tribe that files suit under § 2710(d)(7)(A)(i). Section 2710(d)(7)(B)(ii)(II) provides that if a suing tribe meets its burden of proof, then the "burden of proof shall be upon the State ..."; § 2710(d)(7)(B)(iii) states that if the court "finds that the State has failed to negotiate in good faith ..., the court shall order the State ..."; § 2710(d)(7)(B)(iv) provides that "the State shall ... submit to a mediator appointed by the court" and subsection (B)(v) of § 2710(d)(7) states that the mediator "shall submit to the State." Sections 2710(d)(7)(B)(vi) and (vii) also refer to the "State" in a context that makes it clear that the State is the defendant to the suit brought by an Indian tribe under § 2710(d)(7)(A)(i). In sum, we think that the numerous references to the "State" in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit.

Id. at 56-57. By contrast, the single mention of an appeal to federal district court in 29 U.S.C. § 722(c)(5)(J)(i) does not provide the type of clear statement that this Court has consistently required for a knowing waiver of a State's immunity. The provision also purports to allow appeal to state courts. It does not deal with burden of proof. It does not discuss mediation. In sum, there is only the kind of general authorization for suit in federal court rejected in *Dellmuth*.

Somewhere between *Seminole Tribe* and *Murphy*, there is a point below which a statement is no longer clear enough to support a waiver of Eleventh Amendment immunity. In this case, it is evident that Title I of the Rehabilitation Act is well on the side where the statement is not clear enough to provide notice to the States that they will waive their Eleventh Amendment immunity by accepting federal funds.

B. This Court Has Not Adopted the Notion of a "Non-verbal Voluntary Waiver" of Eleventh Amendment Immunity, Nor Should It.

Petitioner relies on the analysis of the Circuit Courts in the *AT&T* and *MCI* cases for the idea that something less than a clear statement of the intent of Congress to condition the receipt of federal funds on a waiver of Eleventh Amendment immunity is required. Yet, this proposition has not been adopted by this Court. The Court specifically declined to decide the issue in another Telecommunications Act case:

> "Whether the Commission waived its immunity is another question we need not decide, because-as the same parties also argue-even absent waiver, Verizon may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)."

Verizon Maryland, Inc. v. Public Service Com'n of Maryland, 535 U.S. 635, 645 (2002).

Ms. Hurst asks the Court to decide a constitutional issue that the Court has specifically declined to decide in a

case of far greater implications for the public than the narrow issue involved in this case. She has not provided a compelling reason for granting the review of this case.

C. Ms. Hurst's Position Would Reintroduce A Subjective Standard for Interpretation of Eleventh Amendment Immunity.

While claiming that the language of the Rehabilitation Act provides a clear statement of Congress' intent to waive Eleventh Amendment immunity, Ms. Hurst cannot resist resort to the subjective standard that her position would impose on the states:

> In fact, the Respondents/Defendants obviously recognized this clarity because after the Act was amended in 1998 to add the judicial review provision at issue here, the agency amended its own regulations to provide for judicial review in federal court.

Petition at 8. Ms. Hurst does not make to this Court the argument rejected by the Court of Appeals that DARS waived its immunity through its actions, rather choosing to bring it forth as proof of the clarity of the language of the Act. Unfortunately, the effect is the opposite of what is intended. It merely illustrates that the effect of adoption of Ms. Hurst's position would lead this Court back in the direction of a subjective standard for waiver of immunity thoroughly rejected in *College Savings Bank v. Florida Prepaid Post Secondary Ed. Ex. Bd.*, 577 U.S. 680 (1999).

V. CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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